

## “UNIFORM THROUGHOUT THE UNITED STATES”: LIMITS ON TAXING AS LIMITS ON SPENDING

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The power to spend sits oddly alongside the diminutive list of regulatory powers with which the United States Constitution invests the nation's legislature. If Congress may harness the wealth of the nation to regulate any subject, why the bother with an elaborate apportionment of regulatory responsibility between nation and states? What principles will reconcile the power to spend with the federal framework? I begin by recognizing that the power to spend ultimately derives from the power to tax, and that the constitutional text has similar things to say about the exercise of each. Taxation must be “*uniform* throughout the United States.”<sup>1</sup> Spending must provide for the “*common* Defence and *general* Welfare of the United States.”<sup>2</sup> Both powers, then, seem to be subject to a limitation upon discriminatory use. And for either of those limitations to operate effectively, the other must too, and in a congruent way. A requirement not to discriminate in what one takes is emptied by freedom to discriminate in what one gives, and vice versa.

A prohibition of discrimination, not of coercion, is the Constitution's principal limitation upon the federal power to tax and spend. A vigorous antidiscrimination principle, however, does illuminate the line between conditions on taxing and spending which persuade and those which effectively coerce. After recounting the ways in which the Supreme Court has shriveled the

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1. U.S. Const., Art. I, § 8, cl.1 (emphasis added).
2. *Id.* (emphasis added).

Constitution's exhortation against discrimination on either side of the federal fiscal ledger, I conclude that a reinvigorated appreciation of the power to spend depends upon a reinvigorated understanding of the constitutional requirement that taxation be uniform throughout the United States.

### I. THE PROBLEM WITH *DOLE*

In *South Dakota v. Dole*<sup>3</sup> the Supreme Court expounded the scope of Congress's power "to . . . provide for the common Defence [sic] and general Welfare of the United States," and left it looking limitless. Chief Justice Rehnquist's opinion for seven Justices upheld federal legislation which directed the Secretary of Transportation to withhold 5% of federal highway construction funds from any state "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."<sup>4</sup>

The Court began with the well-settled proposition that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."<sup>5</sup> There were, however, *some* limitations on use of the power to make payments to the states. Most obviously, there was the language through which it was conferred: spending must "provide for the common Defence and general Welfare of the United States."<sup>6</sup> Second, conditions on spending must be unambiguous.<sup>7</sup> Third, conditions on spending must relate "to the federal interest in particular national projects or programs."<sup>8</sup> And fourth, other constitutional provisions might impose "an independent bar to the conditional grant of federal funds."<sup>9</sup> The Chief Justice's opinion also suggested a fifth limitation—that some conditions might shift some spending from permissible persuasion to (apparently) impermissible coercion.<sup>10</sup> None of these limitations, however, caused the Court to impugn the legislation at issue.

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3. 483 U.S. 203 (1987).

4. 23 U.S.C. § 158.

5. *United States v. Butler*, 297 U.S. 1, 66 (1936).

6. *Dole*, 483 U.S. at 206.

7. *Id.* at 207. Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991).

8. *Dole*, 483 U.S. at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

9. *Id.* at 208.

10. *Id.* at 211.

Conditional spending analysis both in the Court and in the academy<sup>11</sup> has focused on the problem of coercion, and this focus has lured Court and commentators alike to ask the wrong question. Focus on *Dole*'s first limitation reveals that a construction of "common Defence and general Welfare of the United States" which coheres with the rest of Art. I, § 8, cl. 1 has dramatic implications for the scope of the federal spending power. Consider the words in the context in which they appear:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]<sup>12</sup>

The *Dole* Court concluded that in construing the critical phrase, "courts should defer substantially to the judgment of Congress."<sup>13</sup> This may seem sensible when the question is whether spending furthers the "Defence" or "Welfare" of the United States, but should courts be similarly unwilling to ask whether spending is requisitely "common" or "general"? Each question invites inquiry into substance—in the cases of defense and welfare, into the nature of the social good, implicating both factual and philosophical understanding; in the cases of commonality and generality, into the distinctions that are permissible when providing for defense and welfare. Constitutional requirements of commonality and generality necessarily imply that *some* category of distinctions in spending is impermissible. The question prompted by their presence in the constitutional text is not *whether* an antidiscrimination principle limits federal spending, but *what kind* of discrimination that palpably-present principle precludes.<sup>14</sup>

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11. See Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 Colum. L. Rev. 1911 (1995) (identifying circumstances in which spending should be held subversively coercive, rather than merely persuasive, based on a distinction between "regulatory" spending and "reimbursement" spending); see also David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1 (1994); Richard A. Epstein, *Bargaining with the State*, 146-57 (Princeton U. Press, 1993); William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 Harv. J.L. & Pub. Pol'y 303 (1993); Thomas R. McCoy and Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 Sup. Ct. Rev. 85; Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103 (1987); Richard B. Stewart, *Federalism and Rights*, 19 Ga. L. Rev. 917, 970-73 (1985); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847 (1979).

12. U.S. Const., Art. I, § 8, cl.1.

13. *Dole*, 483 U.S. at 207.

14. See Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of*

This question belongs to the genre of "equality" inquiries that courts have often pursued under the rubric of equal protection, and that have also been held justiciable when their subject is taxation. If courts are willing to decide what kind of discrimination is precluded by a requirement that federal taxation be "uniform throughout the United States," why should they not similarly decide what kind of discrimination is precluded by a requirement that federal spending be "common" and "general"? If the two kinds of discrimination are not the same, then the possibility of effective operation for either is limited to the extent of any overlap. This observation about effective operation does not resolve the interpretative question, but an "intratextualist" approach to interpretation<sup>15</sup> would recognize two implications. First, either courts should decide both what uniformity of taxation requires and what commonality and generality of spending require, or courts should leave both questions alone. And second, when any branch of government considers whether a kind of discrimination in taxing is precluded by the uniformity requirement and whether the same kind of discrimination in spending is precluded by the commonality and generality requirements, that branch should give those questions the same answer. The requirements of uniformity, commonality, and generality should be understood to target the same kind of discrimination. In other words, "common," "general," and "uniform" should be understood as three qualifiers designed to do different parts of the same job, namely to ensure that federal taxing and spending do not distribute burdens and benefits to the people of the United States according to an unlawfully discriminatory criterion. If the prohibited criterion for taxing differs from that for spending, then the extent of the difference undermines the anti-discrimination limitations on taxing and spending. But in order for the prohibited criterion to be the same for taxing and spending, it must have a content which plausibly constrains both.

In this article, I suggest that the criterion prohibited by uniformity, commonality, and generality is state political identity. Federal taxing and spending cannot validly differ among citizens of the United States by reference to the political identities of their states. Thus, validity of conditional spending turns not on its coercive effect, that is, on how much a prospective beneficiary needs the money offered, but on whether that money is being of-

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"Equality" in *Moral and Legal Discourse* (Princeton U. Press, 1990).

15. See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999); Charles L. Black, *Structure and Relationship in Constitutional Law* (Louisiana State U. Press, 1969).

ferred on terms which discriminate among ultimate beneficiaries according to the political identities of the places where they live, travel, own property, or do business.

A conclusion that courts should leave to Congress the questions of uniformity, commonality, and generality would not, of course, diminish in any way the duty of legal scholars to explore the content of those concepts. Analysis of what controlling constitutional language may mean retains its importance whoever its target audience of decisionmakers may be.

## II. THE REQUIREMENT OF UNIFORMITY

The presence of an antidiscrimination principle limiting federal fiscal behavior has received much more attention on the taxation side. Uniformity throughout the United States has been recognized by the Supreme Court to require uniformity of rate structure, not throughout the range of transactions or the kinds of income which may be subjected to taxation, but throughout the United States. Until 1983, the Court's jurisprudence clearly suggested that the federal tax regime faced by citizens could not vary from state to state.

### A. THE TAXES WHICH MUST BE UNIFORM

The current major sources of federal revenue, notably the federal income taxes, are subject to this uniformity requirement. "Direct" taxes are not subject to it, for the Constitution requires of them a different kind of uniformity, namely uniformity of amount per counted person.<sup>16</sup> In *Pollock v. Farmers' Loan and Trust Co.*,<sup>17</sup> the Supreme Court distinguished between taxation of income derived from property (that is, taxation of rents, dividends, and interest), which it held to be "direct," and taxation of income derived from activity ("professions, trades, employments, or vocations"),<sup>18</sup> which it held to be indirect. The Court had recognized as early as 1796 that compliance with the apportionment requirement was probably more trouble than direct taxation was worth,<sup>19</sup> and an exasperated nation responded with the sixteenth amendment.<sup>20</sup> Thereafter, the Supreme Court de-

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16. See Art. I, § 2, cl. 3 and Art. I, § 9, cl. 4.

17. 157 U.S. 429 (1895), vac'd and rev'd on rehearing, 158 U.S. 601 (1895).

18. 158 U.S. at 637.

19. See *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), particularly the opinions of Paterson and Iredell, JJ.

20. "The Congress shall have power to lay and collect taxes on incomes, from what-

cided to treat all federal income taxes as "indirect" and therefore subject to the uniformity requirement in Art. 1 § 8 cl. 1. Explaining this understanding took just one of Chief Justice White's marathon sentences:

[T]he contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the *Pollock Case* by which alone such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity and were placed under the other or direct class.<sup>21</sup>

This outcome was consistent with Justice Iredell's view in 1796 that if a federal tax did not neatly fit within the Constitution's "direct" category nor within the terms "duty," "impost" or "excise," then a background principle of uniformity, applicable to duties, imposts and excises, would kick in.<sup>22</sup> White honored the constitutional text by holding that the United States national income tax is to be characterized as a glorified excise duty.

### B. WHAT UNIFORMITY MEANS

What does uniformity require? Before his elevation to the center seat, White had written on the subject at length. In *Knowlton v. Moore*,<sup>23</sup> his opinion for the Court established that a federal tax regime may be uniform even though its effect upon citizens in one state differs from its effect upon those in another because of differences in state government policy. The required uniformity was, he declared, "geographical":

As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is

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ever source derived, without apportionment among the several States, and without regard to any census or enumeration."

21. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 18-19 (1916). For background commentary, see Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 40-41 (1999).

22. *Hylton*, 3 U.S. (3 Dall.) at 181 (Iredell, J., concurring).

23. 178 U.S. 41 (1900).

argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every state. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States.<sup>24</sup>

Giving uniformity a “geographical significance” caused the requirement to “look to the forbidding of discrimination as between the States, by the levying of duties, imposts or excises upon a particular subject in one State and a different duty, impost or excise on the same subject in another.”<sup>25</sup> Thus the Court’s earlier formulation that a “tax is uniform when it operates with the same force and effect in every place where the subject of it is found” was treated as a requirement of equal force and effect upon the *subject chosen for taxation*, not upon the citizen.<sup>26</sup>

But what leeway did Congress enjoy in defining the subject of taxation? As the facts of *Knowlton* exemplified, state political identity is an implicit component of *any* subject of taxation. Being a “beneficiary” for purposes of the federal inheritance tax at issue in that case turned on testators’ choices made against the background of state testamentary and intestacy law. Being a “school-age child” for purposes of a federal tax credit to one’s parents turns on parenting choices made against the background of state policies on child care, child tax credits, etc. “Sales” of any item for purposes of a federal excise tax are made against a background of state law which may require, permit, restrict, or prohibit such sales. So state political identity is always an *implicit* component of that which Congress selects as its subject of taxation. But can Congress make state political identity an *ex-*

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24. Id. at 107-08.

25. Id. at 89.

26. *Head Money Cases*, 112 U.S. 580, 594 (1884); see also *Knowlton*, 178 U.S. at 86, 106.

*plicit* component of that which it selects to tax? In other words, can Congress identify the fact of states having a particular policy or any other fact explicitly about state identity as its subject of taxation? For example, could a federal tax regime take "sales of widgets in states with policy A" as its subject of taxation and impose no tax on sales of widgets in other states? Or could a federal tax regime take "sales of widgets in states where fact B occurs" as its subject of taxation, where B is so unrelated to the sales of widgets that it can only be expressed as a feature of states in which sales occur, not of the sales themselves? In other words, can the subject of taxation be explicitly defined by reference to state political identity? *Knowlton* suggested that a federal tax on sales of widgets which is explicitly imposed at higher rates in Massachusetts than in Texas would be unconstitutional, while a federal tax on sales of widgets imposed at the same rates in Massachusetts and Texas would be constitutional even if the state of Massachusetts required its citizens to buy a specified number of widgets every year and the state of Texas prohibited its citizens from buying widgets at all. But what of a federal tax which varies by explicit reference to features of state political identity other than the state's name?

Suppose Congress imposes a tax on sales of widgets which differs in rate depending on whether the state of sale requires, allows, or prohibits sales of widgets. Or imagine a federal tax imposed only on sales of widgets in states which have no state income tax, or whose state flags sport a particular design. Such conditions explicitly reference state political identity whether expressed as state policies or as the reflective incidence of other facts in states. For example, a condition that states impose no income tax and a condition that citizens pay states no income tax both explicitly reference state political identity. Are those federal taxes constitutional, like taxes which do not directly target state government behavior but which may indirectly do so? Or are they unconstitutional, like taxes which simply subject named states to different treatment? An advocate of constitutionality may contend that a federal tax attaching state-policy conditions is valid so long as all states are legally capable of meeting the conditions which afford their taxpayers favored federal treatment. A state may not be capable of unilaterally dropping its name or dissolving, but it is capable of changing its flag, its tax structure, and most of its other policies. By this reasoning, a federal tax which explicitly discriminates by reference to the content of state policy is not invalid on that ground so long as



the targeted policy is one which states can choose to change, even if only by state constitutional amendment.

This position is supported by *Florida v. Mellon*,<sup>27</sup> in which the Supreme Court dismissed Florida's challenge to a federal inheritance tax regime despite that regime's inclusion of an 80% credit for state inheritance taxes paid. Outraged that its state constitution's prohibition of inheritance taxes would no longer prove so alluring to wealthy northerners who liked their children, Florida contested the federal Act's constitutionality. In a four-page opinion the Supreme Court told Florida that its perceived injury was too speculative to afford it standing. In dicta, however, the Court also disposed of the state's non-uniformity allegation:

The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (Art. I, § 8, cl.1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States.<sup>28</sup>

Was the Court reading a different statute? The case did not involve a single federal tax rate working "unlike results" because of the "dissimilar laws" and "diverse conditions to be found in the various states." This was a federal tax rate which explicitly varied by reference to those "dissimilar laws." It was not "the same tax" in Florida as it was in states which had homegrown death duties. The *federal tax regime* treated taxpayers differently, and different treatment depended on the policies of their states. Citizens of Florida were required by Congress to pay much higher rates of federal inheritance tax than citizens of other states had to pay.

The Court's call for a uniform "rule of liability" begged the question. What elements of state identity may Congress sneak inside a rule of liability without flouting its constitutional obligation to tax uniformly throughout the United States? Under *Knowlton*, Congress could not have created a rule of liability applicable to all sales of widgets throughout the United States

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27. 273 U.S. 12 (1927).

28. *Id.* at 17.

which had the added characteristic of occurring in states called "South Carolina." But could Congress have created a rule of liability applicable to all sales of widgets throughout the United States which had the added characteristic of occurring in states whose flags sported a bonsai palmetto plant? Are the citizens of the Union taxed uniformly when the federal government demands from them rates of tax which differ by explicit reference to policies of the states where they live, travel, own property, or do business? The Court's glib dicta in *Florida v. Mellon* failed to grapple with this question, and in *Poe v. Seaborn*<sup>29</sup> it treated *Mellon* as merely a *Knowlton* re-run:

And differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity..<sup>30</sup>

*Mellon* did not rescue a federal law from having state-law differences read into it. *Mellon* upheld a federal law which had state-law differences *written* into it. *Knowlton* established that no uniformity issue arises from federal tax law taking state law as it finds it. But can federal tax law explicitly not do so, and instead set up the content of state law as its criterion of liability? Didn't the tax law in *Mellon* flout the rule in *Knowlton*?

An opponent of constitutionality for conditions targeting state political identity may contend that state policy *is* state identity, because the only legal reason for separate state identities is political subdivision. The states' separate existence serves the sole legal function of separate policymaking. Thus tax discrimination based directly on a state government's lawful policy choices is tax discrimination based on the state's legal identity. It directly attacks a discretionary component of the state's identity, and indirectly attacks the core of that identity, the discretion exercised to create the attacked component. Prohibiting other fact conditions which explicitly reference state identity is a corollary of prohibiting state-policy conditions, because there is no reason to frame taxation of any subject by explicit reference to its incidence in a state except to have its terms serve as a proxy for state policy. In response to the observation that *any* terms of federal taxation may interact with state policy choices to affect citizens of one state differently from those of another, an oppo-

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29. 282 U.S. 92 (1930).

30. *Id.* at 117-18 (citing *Florida v. Mellon*, 273 U.S. 12).

ment may argue that constitutional uniformity cannot require an impossible unraveling of indirect effects, but it must require something. The Court claimed to be repeating itself as far back as 1884 when it observed that “[p]erfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once.”<sup>31</sup> But that did not cause the Court to give up and treat the requirement as empty.

A principle that Congress cannot make state political identity a condition of federal taxation is just as manageable as the de minimis uniformity principle under *Knowlton* that Congress cannot make a state’s name a condition of federal taxation. And the broader principle against targeting state government behavior goes much further toward invigorating the uniformity requirement. As the *Pollock* Court recounted, the founding generation did not expect the requirement of uniformity to prove chimerical:

[W]hen the wealthier States as between themselves and their less favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived through commerce, they did so in reliance on the protection afforded by restrictions on the grant of the power.<sup>32</sup>

Joseph Story explained in his *Commentaries* that the uniformity clause was “founded in a wholesome and strenuous jealousy,

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31. *Head Money Cases*, 112 U.S. at 595.

32. 157 U.S. 429, 557 (1895); see also *Downes v. Bidwell*, 182 U.S. 244, 278 (1901) (Brown, J.):

In determining the meaning of the words of Article I, section 6 [sic], “uniform throughout the United States,” we are bound to consider not only the provisions forbidding preference being given to the ports of one State over those of another . . . but the other clauses declaring that no tax or duty shall be laid on articles exported from any State, and that no State shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the States which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some States and not equally upon others. . . . Thus construed together, the purpose is irresistible that the words “throughout the United States” are indistinguishable from the words “among or between the several States.”

Unfortunately, Justice Brown’s “opinion of the Court” was his alone. The Court had split 5-4 concerning application of constitutional limits on taxing to Congress’s regulation of the Puerto Rican territory, and Brown’s hefty 40-page opinion (in the eye-straining micro-font of 182 U.S.) for the majority view that those limits did not apply risked his emergence from obscurity. That risk was obviated when *none* of his colleagues signed on. Justice White wrote a salvaging 60-page concurrence which is politely described in the report as “uniting in the judgment of affirmance.”

which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power, which may endanger the states, as far as it is practicable."<sup>33</sup>

During the ratification debates, even the proposed constitution's most insightful and vociferous detractors did not dream that the uniformity clause would permit discriminatory taxation by reference to state policy. In his *Genuine Information* speech to the Maryland legislature, Luther Martin described how taxes imposed at uniform rates could burden some states more than others, depending on which items Congress selected for taxation. But despite scouring for defects in the proposed federal taxing power, he treated as self-evident the proposition that uniformity called for taxes "to be laid to the same amount on the same articles in each State."<sup>34</sup>

To infer constitutional uniformity from a uniformly applied state-policy condition on taxation solely because states can change their policies is weak even in relation to federal taxation *of the state*, let alone direct taxation of citizens. Either way the people are the ultimate payees. Should not the uniformity of a liability or a benefit be judged in the shoes of those to whom that liability or benefit ultimately belongs? Writing for the post-New Deal Court in *Fernandez v. Wiener*,<sup>35</sup> Chief Justice Stone observed that the uniformity clause "requires only that what Congress has properly selected for taxation must be identically taxed in every state where it is found."<sup>36</sup> Could this ostensibly innocent concept really conceal congressional power to tax citizens for their states' policies? Could those policies be "properly selected for taxation"? A businessman who must pay different rates of federal tax in different states on sales of the same item would be bewildered by a claim that federal taxation was "uniform throughout the United States." Of course, he could just stop doing business in the states targeted for higher federal taxation, and, indeed, the hapless inhabitants of the disfavored state could always move elsewhere. But those were the very scenarios that induced the founding generation to adopt the constitutional requirement of uniformity and its counterparts.<sup>37</sup>

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33. Joseph Story, *Commentaries on the Constitution* § 954 (Hilliard, Gray, and Company, 1833).

34. Luther Martin, *The Genuine Information*, delivered to the Legislature of the State of Maryland, November 29, 1787, reprinted in Max Farrand, ed., 3 *The Records of the Federal Convention of 1787* at 172, 205 (Yale U. Press, 1937).

35. 326 U.S. 340 (1945).

36. *Id.* at 361.

37. For a substantial historical survey, see Jeffrey T. Renz, *What Spending Clause?*,

The balance of this article is predicated on the proposition that the constitutional requirement of uniform taxation throughout the United States prohibits Congress from treating citizens differently by explicit reference to the policies of the places where they live, travel, own property, or do business. Where their states' policies make a federal tax regime more burdensome than it is in other states, even though that regime is applied to them by the federal government in the same way as it is applied to citizens elsewhere, taxpayers have no constitutional complaint. But where *the federal government* taxes citizens differently on the basis of their states' policies, or taxes states differently on the basis of their policies, it fails to tax uniformly "throughout the United States."

C. STEWARD MACHINE CO. V. DAVIS

An opponent of state-policy conditions on federal taxation must, however, address the Court's approving citation and apparent application of *Florida v. Mellon* in *Steward Machine Co. v. Davis*.<sup>38</sup> The Court in *Steward* upheld a federal payroll tax regime that afforded employers a credit of up to 90% for contributions to state social security schemes meeting federal standards.<sup>39</sup> But Justice Cardozo's much cited opinion was carefully confined to recognizing Congress's power to give state governments a choice of methods by which a federal program of taxing and spending is implemented. In particular, Congress may give state governments the option of participating in a federal plan by performing the taxing and spending contemplated by the plan. When Congress directs the federal government to do the taxing and spending only where state governments choose not to participate, it does not violate its obligation to tax uniformly. State taxes imposed pursuant to the federal plan must be considered part of the federal tax regime for purposes of the uniformity clause (though not for purposes of constitutional restrictions on delegating powers!). The *federal government's program* treats citizens uniformly if the combination of federal and state taxes imposed pursuant to it achieves that uniformity. Just as Congress, when possessed of direct regulatory power over a subject, may offer states a choice of regulating by federal standards or

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33 Marshall L. Rev. 81 (1999).

38. 301 U.S. 548, 583, 591-92 (1937).

39. *Id.* at 548.

being pushed aside by direct federal regulation,<sup>40</sup> so Congress, in the exercise of its taxing and spending power, may offer states a choice of taxing and spending by federal standards or being pushed aside (effectively, given a limited tax base) by direct federal taxing and spending.

*Steward* highlights the obverse relation of taxing and spending. To know whether a federal tax imposed at a higher rate on those whose state governments choose not to tax and spend in a particular way *discriminates* against those taxpayers, one must ascertain whether they benefited from higher, offsetting federal spending. That's why the federal tax in *Florida v. Mellon* was truly discriminatory—the federal government taxed Floridians at a higher rate than the citizens of other states, without any obverse federal-spending upside. There was no legal guarantee of such an upside in the federal scheme at issue in *Steward* either, but Cardozo explained at length that taxing and spending for the purposes of the scheme *would* be similarly reciprocal for the people of all states, irrespective of their state governments' policy choices. First, he noted that the proceeds of the federal tax would at most be a small fraction of federal spending on public works and unemployment relief.<sup>41</sup> Then he elaborated:

Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand fulfilment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid.<sup>42</sup>

*Steward* was limited to approving provision “that a tax will be abated upon the doing of an act that will satisfy the fiscal need,

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40. See *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 288 (1981); *FERC v. Mississippi*, 456 U.S. 742, 764-65 (1982); *New York v. United States*, 505 U.S. 144, 167 (1992).

41. See 301 U.S. at 587, 585 n.8.

42. *Id.* at 588-89.

the tax and the alternative being approximate equivalents.”<sup>43</sup> The Court explicitly declined to approve state-policy conditions which did more than afford state governments the chance to participate in national programs of taxing and spending that would be happening anyway:

We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function. The purpose of its intervention, as we have shown, is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity.<sup>44</sup>

The *Steward* opinion purports to dispose of the question of uniformity quite cursorily, and it treats the question of unconstitutional coercion as wholly separate. Yet the Court’s analysis under that separate heading, summarized above, in fact speaks to the problem of discrimination, of non-uniformity. Had the Court fully appreciated this, discerning the point at which persuasion ends and effective coercion begins would not have seemed so imponderable.

[T]he location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officials, with all the ensuing evils, at least to many minds, of federal patronage and power.<sup>45</sup>

When discriminatory distribution of burdens and benefits is recognized to be the unconstitutional evil, the line between persuasion and effective coercion is illuminated: a state is not coerced when it is merely given a chance to do what the federal government will otherwise do for its citizens; a state is effectively coerced when the federal government proposes to benefit its citi-

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43. Id. at 591.

44. Id. at 590-91.

45. Id. at 590.

zens *only if* state policy conforms to federal will. Critical to Cardozo's analysis was the expectation that nonparticipating states, whose citizens could not claim the benefit of a federal tax credit, would receive the alternative benefit of higher federal welfare spending. To take Alexander Hamilton's words, "[t]he wants of the Union are to be supplied in one way or another"—either by the federal government, or by the state governments. "The quantity of taxes to be paid by the community must be the same in either case. . . ."<sup>46</sup> *Steward* turned on the judicial expectation that citizens throughout the United States would end up paying uniform taxes and receiving uniform benefits under a federal program implemented through intergovernmental collaboration.

*Steward* is consistent with a principle that a federal tax regime must not discriminate among citizens by reference to their states' policies. But *Steward* suggests that a federal regime does not violate that principle when it allows state governments to substitute themselves for the federal government in implementing a federal program.

#### D. PTASYNSKI: FROM GEOGRAPHY TO POLICY

This understanding of *Steward* comports with the Court's reading of precedent in its most recent encounter with the uniformity clause. In 1983 a unanimous Court concluded: "the Uniformity Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found."<sup>47</sup> The Court's *articulation* of principle reprised *Knowlton*'s call for "geographical" uniformity. But the Court's *application* of principle did not. The Court upheld a tax exemption for oil produced "(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System."<sup>48</sup> In a decision which the Court has never cited since, *Ptasynski* endorsed this explicit tax discrimination in favor of a region of one state (plus some rather chilly territorial waters) on the ground that Congress had been motivated by "neu-

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46. Federalist 36 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 185, 190 (Mentor, 1961).

47. *United States v. Ptasynski*, 462 U.S. 74, 84 (1983).

48. 26 U.S.C. § 4994(e) (defining "exempt Alaskan oil") (exempted by 26 U.S.C. § 4991(b)(3)); see *Ptasynski*, 462 U.S. at 77.



tral factors”<sup>49</sup> and did not thereby accomplish “actual geographic discrimination.”<sup>50</sup>

But of course Congress did. To be sure, earlier cases had not settled what distinctive physical features of territory could “neutrally” enter the subject of taxation. (Could “proximity to a Grand Canyon” be a valid criterion of liability?) But the distinctive physical feature of falling within specified coordinates on the earth’s surface is the minimum that geographical definition can mean. If Congress can validly define its subject of taxation by reference to the geographical location of that subject’s incidence, then calling the Constitution’s requirement of uniformity “geographical” makes no sense at all. If the uniformity clause really protects against discrimination by reference to geographical location, then *Ptasynski*’s reasoning implies that the clause’s guarantee evaporates whenever it can be circumvented.

Where Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied. See *Knowlton v. Moore*, 178 U.S., at 106. We cannot say that when Congress uses geographic terms to identify the same subject, the classification is invalidated.<sup>51</sup>

Yet the Constitution may forbid Congress from accomplishing a goal in one way while failing to forbid its accomplishment in others.<sup>52</sup> Congress can choose how it defines its subjects of taxation, and achieve all sorts of indirect interactions with state policy by how it does so. But if something which is an aspect of state identity for purposes of the uniformity clause may be slipped into Congress’s definition of a subject of taxation, then a uniformity inquiry is impossible. When asking whether a subject is taxed uniformly throughout the United States, definitive features of state identity must be severed from the subject’s definition, for such features are the question’s quarry. Where they do form part of Congress’s definition, we know the answer is no.

Lest the uniformity clause be completely deconstructed, *Ptasynski* must be read to hold that geography is not a protected aspect of state identity for purposes of the clause. Congress had clearly departed from geographical uniformity, but this did not

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49. *Ptasynski*, 462 U.S. at 85.

50. *Id.*

51. *Id.* at 84.

52. “The Constitution permits Congress to govern only through certain channels. . . . [I]t is no answer to argue that Congress could have reached the same destination by a different route.” *FERC*, 456 U.S. at 786, (O’Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment in part and dissenting in part).

matter because the Court thought the departure fair and reasonable. The Court deferred to Congressional judgment on the question, concluding that "[w]e cannot fault [Congress's] determination, based on neutral factors, that this oil required separate treatment."<sup>53</sup> The decision lets Congress depart from geographical uniformity by satisfying a rational basis test featuring some "fairness" embroidery. But as the English have long been fond of saying, equity varies with the Lord Chancellor's shoe size. Some legislators and courts might well think fair and reasonable a federal tax regime which taxed at higher rates the citizens of states which enjoy "windfall" revenues from disproportionate endowments of natural resources, or which benefit from "windfall" low energy costs because of a balmy climate. Or policy-makers might conclude that a state whose citizens caught the crest of a technological wave should be taxed more steeply than a state which languishes in agrarian poverty. The decision that oil production "north of the Arctic Circle or on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline system" will be taxed less than oil production elsewhere in the United States because the favored region is especially inhospitable and inaccessible looks awfully like a policy choice not to tax a specified subject at the same rate "throughout the United States." It may be a wise choice (though that may not be as obvious to all economists as it was to the Court) and its objective could doubtless be accomplished by direct use of nongeographic criteria which concretely gauge inhospitality and inaccessibility. But is it a choice which a government subject to a uniformity-of-taxation requirement should be able to make?<sup>54</sup>

The *Ptasynski* Court said yes, but in language which presupposed that *some* departures from geographic uniformity would not be requisitely fair. What bases for departure did the

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53. *Ptasynski*, 462 U.S. at 85.

54. The Court's affirmative answer was partly prompted by its decision in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The legislation there at issue made special provision for railroad reorganizations within a defined part of the United States, and the Court upheld it even though Art. I, § 8, cl. 4 empowers Congress to establish only "uniform Laws on the subject of Bankruptcies throughout the United States." That decision, though questionable, was distinguishable, because the Court there had taken judicial notice of the fact that the subject of special bankruptcy regulation (railroad reorganizations) did not occur outside the specified region during the life of the Act. *Id.* at 159-61. Thus the Act's discrimination was only formal, not factual. But Congress's discrimination in favor of oil production from a particular part of Alaska was thoroughly factual. No exemption would have been made absent the principal tax, and no tax would have been imposed absent a tax base.

Court consider impermissible? In other words, what *really* defines state identity for purposes of the uniformity clause? The *Ptasynski* Court did intimate what is prevented by a uniformity requirement which sometimes tolerates geographic discrimination. The discriminatory exemption at issue was, the Court observed, "not drawn on state political lines."<sup>55</sup> Thus the Court implied that the evil which the uniformity clause precludes is discrimination by reference to a state's *political* identity. And what is that but a bundle of policies? Whatever the merits of *Ptasynski*'s disregard of geographical uniformity, the case supports a conclusion that Congress may not insert a state's policies among criteria for liability to federal taxation. Of course, place names are just policies, but are sufficiently immutable to serve as reliable proxies for other place characteristics. The Court held that states or parts of states may be explicitly picked out by Congress for different tax treatment, so long as the Court is satisfied that the different treatment is rational and not prompted by those states' political identities. But if the criterion for different treatment is location, and the courts cannot find any "neutral" basis for the different treatment, then discrimination is either irrational or based on states' political identities. Moreover, as already noted, a prohibition on taxing by reference to state political identity precludes not only conditions which explicitly reference state policy, but also any other fact conditions explicitly referenced to state identity (conditions in the form "in states which . . ."<sup>56</sup>). Out of the haze in which *Ptasynski* leaves the issue of geographical uniformity, one proposition emerges visibly: Congress may not make state political identity a criterion of liability to federal taxation. In the balance of this article, I build on the proposition that the uniformity-of-taxation clause requires exclusion of state policy from the subjects of federal taxation, because what states do *is* who they are. Policy and identity are one.

If Congress cannot impose different tax rates on citizens by reference to state policy, it follows that Congress cannot afford rebates to taxpayers by reference to state policy. Nor may Congress impose discriminatory tax rates or rebates upon state governments themselves by reference to their policy choices. The principle to be applied pervasively is that the ultimate taxpayers,

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55. *Ptasynski*, 462 U.S. at 78.

56. I am indebted to Nick Quinn Rosenkranz for this description of the prohibited form.

the citizens, cannot be treated less favorably by their federal government explicitly because of their states' policies.

### III. UNIFORMITY AND GENERALITY

#### A. THE OBTVERSE RELATION OF TAXING AND SPENDING

In *Knowlton v. Moore*,<sup>57</sup> Justice White recounted the genesis of the uniformity-of-taxation requirement during the Confederation, and concluded:

The proceedings of the Continental Congress also make it clear that the words "uniform throughout the United States," which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, "to operate generally throughout the United States."<sup>58</sup>

The obligation to keep taxes "uniform throughout the United States" informs the requirement that spending be "common" and "general." Just as uniformity speaks to the structure of federal taxation with which the *citizen* is presented, so commonality and generality speak to the structure of federal spending with which the *citizen* is presented. When we ask whether taxation is uniform, we do so on behalf of the ultimate taxpayer. When we ask whether spending is common and general, we do so on behalf of the ultimate beneficiary—the citizen, not his state government. State government identity is relevant for the role it cannot play—it cannot be the basis for discrimination among citizens in federal provision of defense and welfare. "Common" and "general" are to spending what "uniform" is to taxing. If this be accepted, then federal annoyance that states choose to exercise their constitutional powers contrary to federal preferences can no more justify departure from generality in spending than from uniformity in taxing. On neither side of the federal fiscal ledger may Congress discriminate between two neighbors because a state border runs between them.

The obverse relation of taxation and spending is recognized in the structure of Art. I § 8 cl. 1. Congress can do two things with the money it raises from the people of the states. It can hand the money back to taxpayers via rebates, or it can spend

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57. 178 U.S. 41 (1900).

58. *Id.* at 96.

the money "to pay the Debts and provide for the common Defence and general Welfare of the United States." If handing the money back in a way which discriminates between taxpayers based on state policy violates the uniformity-of-taxation requirement, how can spending be for the "common Defence and general Welfare" of the people of the states if it effects the same functional discrimination? Whether state acquiescence in federal policy proposals is the criterion for a rebate to the state's citizens (thus enlarging the state's own tax base) or for a payment to the state (diminishing the state's need to tax its citizens by an identical amount) is surely irrelevant. How can a federal spending program be for the "common Defence and general Welfare" of the people of the states when citizens receive or miss out on its benefits by federal reference to the policies of their states? If such a program is blameless, then the uniformity requirement for taxation is completely pointless, because there is *no* evil of discriminatory taxation which cannot be accomplished through discriminatory spending of the proceeds. As noted earlier, this intratextualist argument for treating two formal requirements of constitutional text as requiring the same thing is not conclusive for interpretation. If historical evidence pointed to an original vision of their interaction at odds with this reasoning, then interpreters might conclude that an incongruity of principles governing taxation and principles governing spending was just an instance of the Constitution "permit[ting] Congress to govern only through certain channels."<sup>59</sup> But absent historical evidence of an original expectation that the text's limitations on taxing and spending would work in different ways (and I have found none), the argument advanced here deserves weight.

A unanimous Court acknowledged the obverse relation of taxing and spending in *Cincinnati Soap Co. v. United States*, conceding that "a federal tax levied for the express purpose of paying the debts or providing for the welfare of a state might be invalid."<sup>60</sup> The Court cited Justice Catron's opinion in the *Passenger Cases*:

Congress has no power to lay any but uniform taxes when regulating foreign commerce to the end of revenue,—taxes equal and alike at all the ports of entry, giving no one a preference over another. Nor has Congress power to lay taxes to

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59. *FERC*, 456 U.S. at 786, (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment in part and dissenting in part).

60. 301 U.S. 308, 317 (1937).

pay the debts of a State, nor to provide by taxation for its general welfare. Congress may tax for the treasury of the Union, and here its power ends.<sup>61</sup>

If spending were not general throughout the Union, then the corresponding taxation would not be uniform. Hence the flaw in the Court's reasoning that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."<sup>62</sup> This passage makes "federal funds" sound like manna from heaven, the product of some undeserved ethereal beneficence. But federal funds are mainly tax receipts, the product of citizens' labors here on earth. That money *belongs* to the people of the states. As Professor Epstein said of *Dole's* facts:

South Dakota must continue to pay the same level of taxes, even though the money it contributes is diverted to other states. The offer of assistance is not an isolated transaction, but must (as with the thief who will resell stolen goods to its true owner) be nested in its larger coercive context. The situation in *Dole* is scarcely distinguishable from one in which Congress says that it will impose a tax of x percent on a state that does not comply with its alcohol regulations—a rule that is wholly inconsistent with the preservation of any independent domain of state power.<sup>63</sup>

The uniformity-of-taxation, common defense, and general welfare requirements work together to make the total fiscal relation of the federal government to the citizen analogous to contract—hardly a new insight in political theory. In return for submission to taxation, the citizen gains the benefits of government. Government determines the distribution of benefits, but uniformity, commonality, and generality preclude government from doing so explicitly by reference to where among the states the citizen lives, travels, owns property, or does business.

But a simple requirement of *geographical* uniformity, recognized by the Court as problematic on the taxation side, would be even more so on the spending side. If Congress were unable to identify geographical locations for its spending, and had in all cases to specify only generalized criteria, then the power to pork-barrel would simply roll down Pennsylvania Avenue to the

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61. 48 U.S. (7 How.) 283, 446 (1849).

62. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

63. Epstein, *Bargaining with the State* at 152 (cited in note 11).

Executive. As recounted already, the Court's uniformity-clause jurisprudence now prohibits discrimination not on the basis of geography per se, but on the basis of state political identity. And a prohibition of that criterion may operate with equal efficacy on the spending side.

Holding the generality required of federal spending to preclude explicit conditioning upon state political identity also comports with the way in which the word "general" is deployed in Article IV §1 of the Constitution.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Could Congress condition its provision for proving state law upon the policy content of that law?

#### B. WHAT GENERALITY MEANS

When endorsing the Hamiltonian vision of power to spend beyond the subjects of federal regulation, the Court in *United States v. Butler* emphasized the relation of taxing and spending by calling general welfare a limitation upon both:

These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. . . . While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress.<sup>64</sup>

Justice Jackson, writing for the Court in 1950, echoed *Butler's* assessment: "Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose."<sup>65</sup> How can a criterion of "common benefit" be met by a federal spending regime which confers or denies benefits to citizens by reference to the policies of their states?

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64. 297 U.S. 1, 65, 66 (1936).

65. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950).

Debates from the founding era are replete with references to the *general* government and the *general* legislature, meaning the government and legislature *over the whole*.<sup>66</sup> The "general Welfare," for promotion of which the Constitution was created,<sup>67</sup> is the welfare of the *whole* United States.<sup>68</sup> It is not an abstraction that authorizes any spending which benefits anyone within the United States. Speaking of that "general Welfare," Alexander Hamilton explained:

The only qualification of the generality [sic] of the Phrase in question, which seems to be admissible, is this—That the object to which an appropriation of money is to be made be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot.<sup>69</sup>

When asking whether federal spending to meet a particular need provides for the general Welfare of the United States, two elements of the inquiry must be distinguished. First, is the *need* sufficiently widespread or weighty for spending to serve the general Welfare? An affirmative answer is necessary, but not sufficient, for constitutionality. This inquiry into the nature of the need may be characterized as asking whether spending to meet it would really provide for the "Welfare of the United States." But second, is the spending *applied* generally? Hamilton's formulation makes clear that an appropriation does not constitutionally serve a general object unless it serves that object generally. A

66. See, for example, the following references recorded in notes from the Philadelphia convention: Farrand, 1 *Records of the Federal Convention* at 242, 287, 338, 355, 357 (cited in note 34). From the debates surrounding ratification, see James Monroe, *Some Observations on the Constitution*, 1788 (suppressed pamphlet), reprinted in Herbert J. Storing, ed., 5 *The Complete Anti-Federalist* 291 (U. of Chicago Press, 1981); Brutus, in Morton Borden, ed., *The Anti-Federalist Papers* 240 (Michigan State U. Press, 1965); Federalist 9 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 39 (Mentor, 1961); Jonathan Elliot, ed., 2 *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 376 (Lippincott Press, 1881). From the debate over the Alien Enemies and Sedition Acts of 1798, see the Kentucky Resolutions (drafted by Thomas Jefferson), reprinted in Elliot's 4 *Debates* at 540.

67. The Preamble to the Constitution proclaims provision for "common defence" and promotion of "general Welfare" to be foundational bases for creation of the new order.

68. See generally Renz, 33 J. Marshall L. Rev. 81 (cited in note 37) (adducing historical evidence that "[t]he General Welfare Clause was a reaction to perceived and actual abuses by Parliament and the English monarchy. . . . [T]he States wanted to ensure that Congress did not tax one state or one region for the benefit of the others."). Id. at 127.

69. Alexander Hamilton, *Final Version of the Report on the Subject of the Manufactures* (Dec. 5, 1791), reprinted in Harold C. Syrett, et al., eds., 10 *The Papers of Alexander Hamilton* 230, 303 (Columbia U. Press, 1966).



spending program explicitly for education in three states is not made "general" by the fact that need for education is widespread throughout the United States. The object "*to which an appropriation of money is to be made*" must extend "*in fact, or by possibility, throughout the Union.*" Hamilton's "or by possibility" recognizes that a state whose citizens *in fact* are a bunch of landlocked retirees may constitutionally receive no share of federal funding for schools and ports—incidence of federal funding must turn on where its objects actually are. But the objects of federal funding must not be defined by reference to the political identities of the states. "Or by possibility" would be violated by a federal appropriation for schools and ports which foreclosed the possibility of its objects being found in State X by defining its objects as "schools and ports not in State X." The reasoning in *Ptasynski* enables Congress to set priorities for spending on discrete capital projects, like dams and canals, by identifying their geographical locations, rather than simply appropriating funds to be spent according to priorities set by the federal executive. But the *Ptasynski* principle also insists that the Court scrutinize geographically specific spending and strike it down if designed to discriminate based on state political identity.

In the course of his famous two-opinion welcome to the New Deal,<sup>70</sup> Justice Cardozo examined the concept of "general Welfare," using language which has since been much cited and much misunderstood. Having noted the triumph of Hamilton's conception of federal spending over that of James Madison, which would have confined spending to subjects within federal regulatory power,<sup>71</sup> he continued:

Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided in the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.<sup>72</sup>

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70. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

71. See, for example, the letter of Madison to Andrew Stevenson, Nov. 17, 1830, in Farrand, 3 *Records of the Federal Convention* at 483-94 (cited in note 34).

72. *Helvering*, 301 U.S. at 640.

The discretion in Cardozo's sights concerned how to decide what spending purposes really promote the welfare of the nation and are appropriately pursued at the national level.

Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. . . . Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation. . . .

When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.<sup>73</sup>

Cardozo's conclusion in *Helvering v. Davis* was that courts will not second-guess Congress's determination that a *need* for spending is sufficiently widespread or weighty for responsive spending to serve the general Welfare of the United States. But that's just the first element of the inquiry. Congress's responsive spending must not be "arbitrary." For Congress to distinguish between prospective beneficiaries by reference to the political identities of their states would be "a display of arbitrary power." That Cardozo's deprecation of arbitrary Congressional classifications was directed to the issue of *generality of application* is made clear by the final passage quoted above. The "locality must yield" when the nation wishes to move in with spending, because otherwise the spending program would be "arbitrary." Why arbitrary? Because the generality of federal spending would be compromised. And the generality with which spending is applied, like the uniformity with which taxation is imposed, is a question for logical analysis, not impressionistic social pulse-taking. Thus courts will decide whether Congressional spending for a "general" purpose is properly general in application.

*Dole* relied on Cardozo's analysis in *Helvering v. Davis* for the proposition that "courts should defer substantially to the judgment of Congress."<sup>74</sup> The Court in *Dole* added a footnote: "The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all."<sup>75</sup> *Buckley* does

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73. Id. at 641, 645.

74. 483 U.S. at 207.

75. Id. at 207 n.2 (quoting *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (per curiam)).

indeed say that "[i]t is for Congress to decide which expenditures will promote the general welfare,"<sup>76</sup> and cites an authority for that proposition—*Helvering v. Davis*. *Buckley* means whatever *Davis* means, and *Davis* means that welfare, not generality of application, is non-justiciable. Cardozo gave no reason to doubt that generality of application must ultimately be determined by courts.

And what goes for generality also goes for commonality. When, a skeptic may inquire, would the courts ever impugn Congress's defense spending for want of commonality? Well, imagine eventual establishment of an antiballistic missile defense system whose interceptor rockets do not suffer from their prototypes' disinclination to hit targets. Then imagine Congress threatening to withhold coverage from any state which failed to implement a federal policy proposal, such as the minimum drinking age at issue in *Dole*. Or imagine Congressional appropriations for sophisticated fallout shelters only in those states which implement such a federal policy proposal. Perhaps Congress is so conscious of its patriotic duty to defend all citizens that using defense spending for policy leverage over the states holds less appeal than using other spending in that way. Location of defense facilities is, of course, a subject of great competition among the states, but wherever located, those facilities serve to defend the whole United States. One can hardly conceive of Congress discriminating in its provision of the *benefit* of defense between citizens by reference to their states' policies. The federal government is independently obliged to protect states from invasion,<sup>77</sup> but a requirement to provide the *same quality* of protection to all states must come from the Constitution's call for commonality if from anywhere. Provision would not be for "*common* Defence" if some states scored the shield and the shelters, while others were left with a mere promise of protection. Why, then, is equivalent discrimination in Congress's provision of other benefits to citizens not precluded by the Constitution's equivalent qualification of the power to spend for their welfare?

The argument that such discrimination is precluded was articulated with a coherence not seen since by counsel in the first challenge heard by the Court to conditional federal spending. In *Massachusetts v. Mellon*,<sup>78</sup> counsel for Massachusetts observed

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76. 424 U.S. 1, 90 (1976).

77. U.S. Const., Art. IV, § 4.

78. 262 U.S. 447 (1923).

that "the proposed appropriations are not *general* in their application, but are confined to those States which accept [the Maternity Act of 1921] and appropriate their own funds to be used for its purposes." After quoting Hamilton on the requirement of generality, he continued:

[A]n appropriation by Congress discriminating between States which accept its conditions and make appropriations to match and States which do not, it is submitted, is on its face purely arbitrary, having no legitimate relation to the general welfare of the country, and cannot be for the "general welfare of the United States." Would any one say for example that Congress could appropriate money for the maintenance of post office facilities or for the pay of federal judges in those States only which should contribute equally towards such expenses, thereby manifestly attempting to coerce the States into contributing to the support of the United States Government?<sup>79</sup>

Writing for a unanimous Court, Justice Sutherland dismissed the challenge for want of standing, on the "heads they win, tails you lose" bases that coughing up their share of taxes without reciprocal benefits burdened the state's taxpayers, not the state government, that the state could not represent the interests of its taxpayers vis-à-vis the United States, and that individual taxpayers could not sue because the effect of the federal spending upon their individual tax liabilities was too indefinite.<sup>80</sup> Thus the discrimination argument slipped out of sight through cracks created by since-discarded standing doctrine.<sup>81</sup>

### C. THE LIMITS OF SPENDING

Two critical contentions may be derived from the foregoing analysis. First, uniformity of taxation precludes discrimination by reference to state political identity. Second, a requirement of commonality and generality limits the spending power in the same way that uniformity limits the taxing power. It follows that the power to spend conferred by Article I § 8 cl. 1 does not authorize Congress to make its release of funds to benefit citizens conditional on their states' behavior. Congress may condition on state policy the *method* by which it delivers a benefit to citizens,

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79. Id. at 465, 468.

80. Id. at 482-87.

81. State challenges to conditional spending statutes were decided on the merits in *Oklahoma v. U.S. Civil Serv. Comm.*, 330 U.S. 127 (1947) and *South Dakota v. Dole*, 483 U.S. 203 (1987).

but not the *fact* of delivery. In other words, Congress may give states a choice of conveying the benefit of federal money to their citizens in accordance with policy prescribed by Congress or having Congress convey the benefit to citizens directly. That much follows from *Steward Machine Co. v. Davis*. Just as Congress may give states the option of replacing the federal government as both taxpayer and spender in the implementation of a federal program, so Congress may give states the option of replacing the federal government only on the spending side of a federal program. But Congress cannot give states a choice of spending according to federal prescription or depriving their citizens of the spending.

In order for Congress to fulfill its constitutional obligations to tax the people of the United States uniformly and to spend for their defense and welfare commonly and generally, its spending must conform to two requirements. First, its provision for *direct* spending to benefit citizens must not be based upon criteria which explicitly reference state political identity. All spending must be on conditions, for the obligation to spend only "in Consequence of Appropriations made by Law" contemplates that spending will always have an articulated subject.<sup>82</sup> Conditions on spending which identify a state of affairs prompting payment will always indirectly implicate state policy, even if their subject is within federal *regulatory* power, because every state of affairs within a state is indirectly affected by state government policy choices. For example, "having a school-age child" will at least indirectly be influenced by past and present state government policy (on child care, tax credits, etc.), but would still be a permissible basis for federal spending. The same distinction holds on the taxation side. State government policy might encourage sales of one item and discourage sales of another, but a federal sales tax which applied a higher rate to the first item than to the second throughout the United States would still be uniform. What destroys constitutional uniformity and generality is conditioning of taxing or spending upon particular state government behavior, whether past, present, or future. Conditions which articulate what a state must have done, be doing, or promise to do cannot be imposed on direct federal taxing or spending. But conditions which merely identify a fact or circumstance which does not constitute state government behavior (even though state government behavior indirectly affects the incidence of that

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82. U.S. Const., Art. I, § 9, cl. 7.

fact or circumstance), may be imposed on direct federal taxing or spending, with one qualification. Conditions on taxing or spending must not explicitly reference state identity, and so cannot authorize taxing of or spending on persons "in states which" have a particular feature. Direct taxing of or spending on any legitimate subject is possible without explicit reference to the subject's location "in states which" have some characteristic—the only reason for resort to such a form of condition is to introduce to the subject of taxing or spending an unrelated factual proxy for state policy.

The second spending requirement flowing from Congress's obligation of uniformity and generality is that congressional spending via state grants must always be part of a federal spending program which will proceed in all states for the benefit of their populations whether state governments choose to participate or not. State governments may be offered the option of spending federal funds in accordance with the policy requirements of a federal program, but only where the federal government can and will implement the program directly should state governments choose not to do so. Objection may be heard that Congress should be able to make state grants on the same basis as it can spend directly, namely by reference to fact or circumstance criteria, without necessarily detailing how the funds must be spent. But the constitutional obligations of uniformity and generality are imposed upon Congress and are owed to the citizen—*Congress* is obliged to ensure that federal funds are applied to the benefit of citizens in the same way throughout the Union. To see this, return to the common-defense hypothetical. Congress cannot present states with a choice of missile-shield coverage if their policies conform to federal preferences or cash if they don't. Nor may Congress offer state governments a simple choice between missile-shield coverage and cash. Federal spending for the common Defence and general Welfare must benefit citizens in the same way irrespective of the political identities of their states. If Congress funnels funds through the states, it must do so on terms which prescribe how the funds are to be applied to the benefit of their citizens, and the terms must be the same as those on which Congress will spend directly in those states whose governments choose not to participate in the federal spending program. Indeed Congress can dictate to states how funds are to be spent only if those funds will be so spent whether the states choose to participate in the spending or not. States may be allowed some discretion in implementation, just as

bounded discretions may be conferred upon the federal departments and agencies which will spend should the states decide not to do so, and just as institutional beneficiaries of direct payments based on fact or circumstance criteria like "hospital which meets operating criteria X, Y and Z" have some discretion in spending, bounded by who they are. But Congress cannot just hand state governments large lumps (or "blocks") of federal money without instructions concerning their use. And Congress cannot give instructions unless the federal government can and will implement them itself should state governments say no. Thus, for example, Congress cannot spend to fund implementation by the states of a policy unless Congress can and will implement that policy directly in any state which chooses not to do so.

State authorities and institutions may, of course, be beneficiaries of *direct* federal payments based on fact and circumstance criteria like "hospital which meets operating criteria X, Y, and Z" or "school which meets educational criteria X, Y, and Z" or "highway construction project which meets construction criteria X, Y, and Z." Indeed, just as Congress cannot impose discriminatory taxes upon state governments or their agencies,<sup>83</sup> Congress cannot deprive state government entities of their share of direct federal spending.

While federal spending is certainly not limited to the subjects over which Congress has regulatory power, the exercise of regulatory power is the only way Congress can *dictate* how state governments behave. If Congress validly does so, then the spending power may be used to support the Congressional mandate by furnishing the states with funding to do what Congress has validly required them to do. But Congress can never validly give states a choice between affording their citizens the benefit of federal money and declining to implement a federal regulatory scheme. *Even where the regulatory power to dictate a scheme exists*, Congress cannot merely present states with the option of forgoing on their citizens' behalf the benefit of federal funds, for any exercise of that option would deprive the federal spending program of its constitutionally required generality.<sup>84</sup> Congress cannot make receipt of federal benefits by a state's

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83. *South Carolina v. Baker*, 485 U.S. 505, 518 n.11, 523 (1988).

84. The Court has assumed that if Congress has power to require certain things by direct regulation, then a fortiori Congress may make those things mere conditions of its spending. See *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980). The Court's attention was, however, not turned to the generality argument made here.

citizens contingent on the state's exercise of a choice whether to perform a task.

#### IV. COERCION

To this legal analysis of the spending power, coercion is a red herring. In skewering arguments against conditional grants which allege coercion, the Supreme Court and commentators have done little more than make the pellucid point that a choice between conforming to federal will or being subjected to discriminatory treatment for failing to do so may be a real choice. On the facts of *Dole*, the threatened loss of 5% of the federal highway funds otherwise payable did not make a state's choice to keep its drinking age under 21 impossible. But it did discriminate against the people of that state on the basis of a policy which their state government was constitutionally entitled to maintain. The *Dole* Court's signal that a federal spending program which really did compel compliance with its conditions would be invalid seems misconceived. Degrees of effective coercion derive not from the nature of attached conditions, but from the extent of a state's need for proffered funds. Genuine need for federal funding is surely the paradigm case for federal spending. It makes little sense to say that the same condition leaves spending constitutional if the payment does not promote Defence and Welfare much, but renders spending unconstitutional if the payment promotes Defence and Welfare a lot!

Compare the conditions on federal spending with the demands of a panhandler. The coercive character of the panhandler's conduct derives not from what he requests, but from the degree of insistence, rising to menace, with which he makes his demands. If his behavior in support of the demands is menacing, it may be coercive. The demands do not coerce—the background behavior does, and because that background behavior is *illegal* (whether or not it supports any demands), we may frame the *legal* problem as one of coercion. Likewise, conditions on spending do not coerce. Coercive effect derives from a prospective beneficiary's need for the spending, which compares with the pedestrian's degrees of desire to be free from degrees of menace. But the prospective beneficiary's need for spending does not imply a legal right to that spending, whereas the pedestrian does have a legal right to walk free from menace. Framing the *legal* problem in the spending case as one of coercion is therefore inapposite. The menacing panhandler's conduct is il-



legally coercive because it offers a choice between two things to which his accosted pedestrian has a legal right—to walk unmolested down the street and to keep his money in his pocket. Conditional federal grants to states are not illegally coercive unless states are legally entitled both to receive the grants and to behave in a manner inconsistent with the conditions. And states are not legally entitled to receive the grants. The Constitution does not entitle states to federal spending, and even when a prohibition of discriminatory spending is recognized, it is just as well obeyed by spending nowhere as by spending everywhere.

The constitutionality of a condition turns not on whether the worthiness of spending effectively coerces compliance, but on whether the condition explicitly requires that benefits of the spending be distributed among citizens in a way which discriminates based on their states' policies. Whether the spending power authorizes spending on particular terms cannot bear an inverse relation to the public importance of the spending. And discrimination in fact furnishes the best benchmark of coercive effect. If a condition on federal spending lets state policy determine only the *method* by which federal spending reaches the citizen, then a state's agreement to play federal funnel will not seem imperative to anyone. But if state policymakers risk their citizens' loss of the benefit of federal spending unless they funnel it on federal terms, then their compliance is indeed effectively coerced. And that remains true however intimately related to the subject of spending the federal conditions may be.

## V. RELATEDNESS

*Dole's* third limitation, "that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs'," <sup>85</sup> was treated by that Court as an inquiry into whether conditions on spending address the same subject as the spending. <sup>86</sup> Disagreement between the majority and Justice O'Connor turned on the necessary degree of congruence between the subject of the condition

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85. 483 U.S. at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

86. *Id.* at 208 n.3. The Court framed the inquiry as concerning the extent to which conditions relate to the *purpose* of spending but it must have meant the subject of spending, as a purpose inquiry has nowhere to look but to the conditions on which spending is offered and affords no basis for privileging the conditions concerning how the money is to be spent over other conditions on payment—the latter may well express the primary *purpose* of the whole exercise.

and the subject of the spending.<sup>87</sup> But the original source of the principle is *Steward Machine Co. v. Davis*,<sup>88</sup> and the context in which Justice Cardozo spoke of relatedness there reveals that he was making a different point. He questioned the constitutionality not of a condition on federal spending unrelated to the subject of the spending, but of a condition "unrelated in subject matter to activities fairly within the scope of national policy *and* power."<sup>89</sup> In other words, Cardozo questioned conditions unrelated in subject matter to activities fairly within the scope of what the national government both plans to do (national policy) *and* can do (national power). The relation required by Cardozo was to *whatever the national government is doing*. The national government may condition *its* implementation of a program upon whether states would rather implement the program themselves in conformity with national policy. What the national government cannot do is condition *benefit* to the people of a state upon their state government implementing a federal proposal. States may volunteer to be deputized to collect taxes and dispense benefits in accordance with a federal program, but it must be a *federal program*, which is going to be implemented for the benefit of the citizens whether their state governments choose to be involved or not. Thus the relatedness requirement precludes federal conditions which make benefit to the citizens of a state *turn* on state policy. Such conditions would deprive citizens of noncompliant states of their share of federal benefits, and so destroy the generality of federal spending.

Justice O'Connor's concern about conditions unrelated in subject to the spending upon which they are imposed<sup>90</sup> is, however, satisfied by the spending principles set forth in this article. As will be explained later, state-policy conditions which concern how federal funds are spent may readily be converted into valid fact or circumstance criteria for that spending. But state-policy conditions unrelated in subject to the spending are not readily recast in valid form.

## VI. THE REST OF THE DOCUMENT

*Dole's* fourth limitation steers attention to other provisions of the constitutional text which may have something to say about

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87. Id. at 208 n.3, 213-18.

88. See id. at 212-13 (O'Connor, J., dissenting).

89. *Steward Machine Co.*, 301 U.S. at 590 (emphasis added).

90. *Dole*, 483 U.S. at 212-18 (O'Connor, J., dissenting).

conditional spending. And among these, only support is found for a prohibition of discrimination based on state political identity. Article IV § 2 cl. 1 promises to "[t]he Citizens of each State . . . all Privileges and Immunities of Citizens in the several States," and Article IV § 4 requires the United States to "guarantee to every State in this Union a Republican Form of Government." A privilege of republican citizenship is surely to receive from government the benefit of one's taxes. The Declaration of Independence cited "imposing Taxes on us without our Consent" as a core concern warranting revolution. The Constitution of 1787 made such imposition on the citizens of a particular state possible, but precluded the greatest evil which taxation without consent might otherwise produce—taxation of some states purely for the benefit of others.<sup>91</sup> Conferring such a discriminatory benefit could not be for the general welfare of the people of the states, and would deny citizens of the states not benefited a privilege of their citizenship. Moreover, taxes applied not for the general welfare of the people of the states, but only for the welfare of the people of those states which acquiesce in federal policy proposals, could be characterized as takings of private property from the citizens of any state which does not acquiesce "for public use without just compensation," in violation of the fifth amendment. Such an understanding certainly comports with Professor Epstein's explication of the takings clause,<sup>92</sup> and fits even if the clause only restricts governmental power to *acquire* assets from citizens.<sup>93</sup>

The apparent truism of the tenth amendment here also seems to do some real work: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." For Congress to deny the people of a state a benefit because of the way in which their state government exercises a power reserved to it by the tenth amendment arguably violates that amendment. The *Dole* Court discounted this contention, citing earlier decisions for the proposition that "a perceived Tenth Amendment limitation on congressional regulation of state affairs d[oes] not concomitantly limit the range of conditions le-

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91. The Constitution makes further provision elsewhere against this danger. See Art. I, § 10, cl. 2; *Downes v. Bidwell*, 182 U.S. 244, 278 (1901).

92. Epstein, *Bargaining with the State* at 146 (cited in note 11). Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 283-305 (Harvard U. Press, 1985).

93. Cf. Jed Rubenfeld, "Usings," 102 Yale L.J. 1077 (1993).

gitimately placed on federal grants."<sup>94</sup> Limitations on the spending power certainly have nothing to do with state-immunity doctrine, but neither does the tenth amendment. In any event, the Court's pronouncement answered an argument different from the one made here. South Dakota had argued that the "independent constitutional bar" limitation was "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."<sup>95</sup> That line has not been worth trying in the Supreme Court since 1936.

The "independent constitutional bars" that did excite the *Dole* Court's attention were the provisions of the fourteenth amendment and the Bill of Rights, minus number ten. The examples given by the Court were conditions requiring state governments to engage in unconstitutional action, namely "invidiously discriminatory state action or the infliction of cruel and unusual punishment."<sup>96</sup> But the Court did not address the distinct issue whether Congress can condition state grants upon state action in which state governments are constitutionally entitled to engage, but in which the federal government is *explicitly* forbidden to engage. As the tenth amendment is an explicit prohibition against federal exercise of powers not possessed, one might not expect much illumination from a distinction between federal government circumvention of its own want of power and federal government circumvention of explicit or structural constitutional limitations upon the exercise of its powers. Yet the Court's decision in *Washington Airports v. Noise Abatement Citizens* turned on that distinction.<sup>97</sup> The case concerned a property transfer rather than spending simpliciter<sup>98</sup>—Congress pro-

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94. *Dole*, 483 U.S. at 210.

95. *Id.*

96. *Id.*

97. 501 U.S. 252 (1991).

98. For an argument that the power to spend beyond the subjects of federal regulatory power actually has its home in Article IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.") see David E. Engdahl, *The Basis of the Spending Power*, 18 Seattle L. Rev. 215 (1995). Professor Engdahl argues that Art. I, § 8, cl. 1 only confers a power to tax, but even if he is right that the provision just requires taxation to have the purpose of paying the debts and providing for the common defense and general welfare of the United States, the provision is breached if the proceeds of taxation are not so spent. Moreover, authors of the antecedent Articles of Confederation deployed the same language of common defense and general welfare to qualify an unambiguous power to spend, which supports resolution of Article I's ambiguity in favor of a similarly-limited power to spend. See Articles of Confederation, Art. VIII: "All charges of war and all other expences [sic] that shall be incurred for the common defence or general welfare, and allowed by the United States,

vided for transfer of the National and Dulles airports to a state agency established by compact between Virginia and the District of Columbia, but conditioned the transfer upon state creation of a board of review composed of congressmen and having power to veto the state airport authority's decisions. The Court held that Congress could not evade separation-of-powers limitations upon its supervision of the federal executive by transferring activities to the states on condition that they invest its members with otherwise-unattainable supervisory power. Justice Stevens, for the majority, wrote:

Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy.<sup>99</sup>

And, he noted, "[n]othing in our opinion in *Dole* implied that a highway grant to a State could have been conditioned on the State's creating a 'Highway Board of Review' composed of Members of Congress."<sup>100</sup> If conditional spending cannot be used to circumvent the separation of powers, why can it be used to circumvent the tenth amendment? The Court's answer boiled down to an assertion of belief that the separation of powers matters more than federalism.<sup>101</sup>

Under the Australian Constitution, which authorizes conditional grants to state governments,<sup>102</sup> a distinction between circumventing mere want of power and circumventing explicit restrictions on power was critical to the Australian High Court's decision in the *Magennis* case.<sup>103</sup> The Court condemned legislation which explicitly facilitated a federal government attempt to circumvent the Australian Constitution's "just terms" requirement for federal compulsory acquisitions.<sup>104</sup> The federal gov-

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in Congress assembled, shall be defrayed out of a common treasury . . ."

99. *Noise Abatement Citizens*, 501 U.S. at 277.

100. *Id.* at 271.

101. *Id.*

102. Constitution of the Commonwealth of Australia, § 96: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit." This provision could plausibly have been construed merely to authorize payments to assist states with their general revenue requirements, subject to such terms and conditions concerning repayment as the Parliament thought fit. Instead, it has become a flexible instrument of federal influence over state behavior.

103. *P.J. Magennis Pty. Ltd. v. The Commonwealth*, 80 C.L.R. 382 (1949).

104. Australian Constitution, § 51(xxxi).

ernment agreed with the State of New South Wales that the federal government would finance a state government compulsory acquisition of land in support of a federal postwar soldier-settlement scheme. The agreement explicitly provided for the land to be acquired at prices fixed by reference to market value at a specified date several years earlier. The Court held that federal legislation authorizing the agreement with the states to fund their compulsory acquisitions under the scheme violated the constitutional limitation on *federal* acquisitions. But the sequel to that story is instructive. The New South Wales state parliament simply amended its legislation to authorize compulsory acquisitions under the scheme independent of the legality of the federal-state agreement. The state government then finished the land grab, in accordance with the intergovernmental agreement and quite possibly with the added understanding that future federal largesse might depend upon its action. Lacking a generality limitation to enforce, the Australian High Court was powerless to block the flow of federal funds to the scheme.<sup>105</sup> A constitutional jurisprudence which precluded discrimination based on state policy would have insisted that the federal soldier-settlement spending program proceed only on terms which the federal government was willing and able to implement directly in any state which chose not to participate. Thus a nondiscrimination principle may stymie such constitutionally corrosive intergovernmental machinations.

## VII. CONDITIONAL GRANTS AND INDIVIDUAL BEHAVIOR

My focus thus far has been upon federal spending conditioned on state behavior, but what of federal spending conditioned on individual behavior? Conditions requiring individual behavior qualify *all* direct payments to individuals. Even direct spending (or taxation) explicitly by reference to *state policy* involves targeting an *individual action* which brings the person benefited (or taxed) into relation with the state, such as residence, travel, property ownership, or commercial activity therein. Thus the requirement that state policy conditions not be placed upon direct taxation of, or payments to, individuals, is a requirement that the criterion for liability or benefit not *explicitly* reference whether individuals' actions bring them into rela-

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105. *Pye v. Renshaw*, 84 C.L.R. 58, 83 (1951).

tion with a state having policy or feature A rather than policy or feature B.

But satisfying a criterion for liability or benefit may *implicitly* turn on the state policies with which an individual is saddled. This troubling truth helps explain the much criticized trajectory of the Supreme Court's reasoning in *United States v. Butler*, which can be understood as an attempt to answer the following question: What of conditions for favorable federal treatment which require individual behavior that state governments retain constitutional capacity to *preclude* or conditions for unfavorable federal treatment which target individual behavior that state governments retain constitutional capacity to *command*? As noted earlier, even federal regulatory power over the subject of an individual-behavior condition cannot exclude all of the indirect effects which state government policies have on incidence of that behavior. But federal regulatory power, where it exists, can be used to trump state *prohibitions* and *requirements* of individual behavior. The difficult potential conditions on direct federal benefits and taxes, then, are these: a condition for favorable treatment which requires individual behavior that the federal Constitution neither requires states to permit nor empowers Congress to authorize, and a condition for unfavorable treatment which targets individual behavior that the federal Constitution neither prevents states from commanding nor empowers Congress to prohibit. Where Congress is empowered to regulate the field, its stipulation of individual-behavior conditions may be supported by regulations which trump state government barriers to performance. But what if Congress has no such separate power? For example, "having school-age children at a school which meets educational criteria X, Y, and Z" identifies individual behavior and does not explicitly relate that behavior to state policy. But in fact it depends upon the citizen educating his children in a state which permits schools meeting criteria X, Y, and Z to operate within its borders. Can this be imposed as a condition of federal spending if Congress lacks, or has failed to exercise, regulatory power to authorize operation of such schools throughout the United States?

The *Butler* Court thought not. Noting that contracts for reduction of acreage and control of production did not fall within federal regulatory power as then construed, the Court opined:

An appropriation to be expended by the United States under contracts calling for violation of a state duty clearly would offend the Constitution. Is a statute less objectionable which

authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.<sup>106</sup>

The Court acknowledged federal power to spend beyond the subjects of federal regulatory power, but struck down the Agricultural Adjustment Act as "a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."<sup>107</sup> Some commentators have treated these conclusions as contradictory,<sup>108</sup> but they are not. *Butler's* principle does not prevent Congress from passing out money to the people by reference to subjects outside federal regulatory power. But *Butler* says that Congress cannot attach its choice of individual-behavior conditions to federal payments if state governments have a tenth amendment right to regulate that behavior. And states do have such a right unless the Constitution excludes it or confers on Congress power to trump it. Under *Butler's* vision of a spending power only exercisable when it does not invade the substance of state regulatory responsibility, Congress *could* spend on any subject outside federal regulatory power simply by adopting state regulatory criteria. Thus *Butler's* approach to spending would allow the criteria for federal spending to vary from state to state in order to accommodate exercise of the states' regulatory prerogatives. Suppose one state permitted schools which met educational criteria X, Y, and Z, but another state permitted only schools which met educational criteria X, Y, but not Z. Consistent with *Butler*, Congress could make direct payments using a criterion of "having school-age children at a school which meets state educational criteria." Thus *Butler's* reasoning does not prevent federal spending beyond the subjects of federal regulatory power, it just robs that spending of an independent regulatory role.

The logic of *Butler's* approach to spending conditions would condemn a federal tax imposed on sales that state governments have a right to prohibit or command. But *Butler's* attempt to shelter subjects of state regulatory responsibility from the effects of federal spending cannot be reconciled with the weight of authority addressing what uniformity means. The Court in

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106. *Butler*, 297 U.S. at 73.

107. *Id.* at 68.

108. See Engdahl, 44 Duke L.J. at 36-37 (cited in note 11); Laurence H. Tribe, 1 *American Constitutional Law* 836 n.14 (Foundation Press, 3d ed. 2000).



*Knowlton v. Moore*<sup>109</sup> emphatically took the position, consistently approved since, that Congress can tax individual behavior notwithstanding that behavior's susceptibility to state regulation. "The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity."<sup>110</sup> Uni-form means of one form, not one effect. Congress can tax what some states require and spend on what some states ban. For Congress to accommodate its taxing and spending to the stances of state policy would require *departure* from the principle that each federal fiscal measure have one form throughout the United States. Though the Court's approach in *Ptasynski* undercuts this formalist principle by allowing departures from geographical uniformity so long as they do not implicate state political identity and are rational, it leaves intact the proposition that Congress is required by the obligations of uniformity, commonality, and generality to present citizens with benefits and burdens which do not differ by reference to their states' policy choices. Under *Butler*'s approach, Congress could spend federal money on education throughout the United States, but could not insist that the federal funds spent in Alabama and the federal funds spent in Massachusetts purchase products which equally deserve the description "education."

Federal taxing and spending conditioned on individual behavior which state governments have a right to prohibit or require, like federal taxing and spending conditioned on any other state of affairs which state government policy affects, is constitutional. This allows much federal taxing and spending which would otherwise be conditioned on state policy to be conditioned with identical effect on individual behavior. But not all. Take, for example, a state grant conditioned on the recipient state spending the money on hospitals which meet operating criteria X, Y, and Z, *and* conditioned on the state imposing a minimum drinking age of at least 21. Under *Dole*'s vision of the spending power, the grant must be a lawful exercise of Congress's power to provide for the general Welfare of the United States, because the extra danger on highways created by teenage drinking is less related to highway construction than the extra demands on hospitals created by such behavior are to hospital

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109. 178 U.S. at 108.

110. *Phillips v. Commissioner*, 283 U.S. 589, 602 (1931), (Brandeis, J. for a unanimous Court.)

operations. I have sought to explain that the constitutionality of the grant turns on what Congress can and will do should the state choose not to accept it. The grant is lawful if upon its rejection, Congress will spend the funds directly on in-state hospitals meeting operating criteria X, Y, and Z, *and* Congress will exercise its own regulatory power to impose a minimum drinking age of at least 21. The grant is unlawful if, upon rejection, Congress cannot or will not do both those things.

Now look at what happens in a world where the thesis of this article is accepted. To spend without directly regulating, Congress is forced to turn the state grants into direct payments to hospitals meeting operating criteria X, Y, and Z, but may give the states an option to funnel the payments on those terms. The casualty of the change is the condition on the state grant which is insufficiently related to the subject of the spending. It is not possible to reformulate the minimum drinking age criterion as an individual-behavior condition on direct payments to the hospitals. Because it is unrelated to the actual spending of the money, that state-policy condition cannot shed its state-policy skin. A formal generality requirement which precludes explicit conditioning of federal benefits upon state political identity is sufficient to eliminate such unrelated state-policy conditions on federal spending. As already explained, the requirement not only precludes state-policy conditions, but also any non-policy fact condition which explicitly references state identity, a form unavoidable only where the condition is a stranger to the spending and is actually serving as a surrogate for state policy. Thus conditions in the form "*in states which* have more than ten drunk-driving accidents per 100,000 people per year" or "*in states in which* a standardized teenage drinking survey shows more than 20% of teenagers drink regularly" are as doomed as the drinking age policy condition itself. Highly relevant conditions, like the operations of hospitals on which funds are to be spent, easily convert to individual behavior criteria, or to other blameless fact or circumstance criteria. But irrelevant conditions, like the state drinking age, cannot convert without explicit reference to state identity ("*in states which . . .*"). Even if non-policy fact criteria referring to state identity were tolerated, finding factual proxies for state-policy conditions would be challenging, for most plausible candidates would not correlate cleanly with incidence of the policy Congress sought to favor. For example, suppose Congress conditions its payments to hospitals upon meeting operating criteria X, Y, and Z, and upon their presence in states with

less than a specified annual per capita rate of drunk-driving motor vehicle accidents. The rate of drunk-driving accidents may well be positively correlated with lower state drinking ages, but the correlation is unlikely to be perfect. Whatever rate of accidents Congress specifies, some states which have the policy Congress favors may miss out on funds, while some states with lower drinking ages may qualify for funds.

Congress's pork-barrelling power to spend with geographic specificity, a correlative of the power to tax with geographic specificity recognized by the Court in *Ptasynski*, seems a more promising vehicle for controlling state policy. But as the *Ptasynski* Court made clear, geographic specification is the prime circumstance in which the Court will search for evidence of congressional purpose, and will strike down measures designed to attack state political identity. Whatever the merits of such a judicial inquiry, *Ptasynski* makes it the Court's approach, and allows geographic specification only on the basis that such an inquiry will determine constitutionality. A future Court may well require that in order to spend with geographic specificity, Congress must set forth general fact and circumstance criteria for its spending, and justify its geographically specific distribution under those criteria, much as an administrator would otherwise have to do.

To reflect further on how fiscal relations would work under the regime proposed, take the example of Congressional direct spending by reference to the individual-behavior criterion of "having school-age children at a school which meets educational criteria X, Y, and Z." Congress may allow state governments to spend federal money by reference to that criterion as an alternative to Congress doing so. But the state governments must spend the money in the way that Congress wants to do *and* has power to do, that is, by direct payments to those meeting the criterion. Federal payments to states must be subject to conditions concerning their use which mirror what the federal government can and will do in states that refuse them. Congress cannot finance state activities which it cannot replicate in states whose governments decline to pursue them. If Congress has regulatory power to run school systems meeting educational criteria X, Y, and Z, it may do so and afford the states the alternative of doing so in its stead. But if Congress only has power to *spend* on the subject, then a parallel pattern of spending is all that it can finance the states to do. Moreover, while Congress might directly fund "schools meeting educational criteria X, Y, and Z," and let

states pass out the money if they wished, it could not define its subject of funding as "*state-run* schools meeting educational criteria X, Y, and Z," for that would explicitly condition payments upon state policy.

### VIII. WHO GOES TO COURT?

The uniformity of taxation and the commonality and generality of spending are constitutional obligations upon the federal government imposed to protect the citizens of the United States, not their state governments. It is the citizen who suffers the primary injury when his state government does not receive federal funds because of noncompliance with a state-policy condition, just as it is the taxpayer who is injured when subject to higher federal tax rates or lower rebates than his counterparts in other states on account of his state's policies. But the Supreme Court's recognition of state government standing to challenge conditional federal grants to the states<sup>111</sup> acknowledges that discriminatory denial of those federal benefits injures the state too. Indeed discriminatory denial even of directly paid federal benefits injures the state. Recall that unconstitutional discrimination in spending occurs when denial of federal benefits is *not* accompanied by a compensating reduction in federal taxes which lets states fill the federal government's shoes. When the federal government swipes uniform shares of the states' tax bases, but confers non-uniform benefits upon their people, a state whose citizens miss out on federal benefits is injured by the loss of that part of its tax base which went federal purely for the benefit of other states.

Likewise, individual taxpayers in the disfavored state are injured by having to pay a slice of federal tax purely for the benefit of those in other states as surely as if rebates of their taxes turned upon state compliance with federal conditions. Taxpayer standing to challenge illegal federal spending seems a sensible counterpart to prospective-beneficiary standing to enforce state compliance with conditions on legal federal spending.<sup>112</sup> Such taxpayer standing was rejected by the Court in the taxpayer suit brought alongside Massachusetts' challenge to the federal Ma-

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111. See *Oklahoma v. U.S. Civil Serv. Comm.*, 330 U.S. 127 (1947); *South Dakota v. Dole*, 483 U.S. 203 (1987).

112. See *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 74-75 (1992); *Pennhurst St. Sch. & Hospital v. Halderman*, 451 U.S. 1, 27-30 (1981); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

ternity Act of 1921 on the basis that impact of the illegal spending on individual taxpayers' liabilities was too "indefinite."<sup>113</sup> More recently, the Court has suggested that taxpayers may have standing to challenge federal spending which "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power."<sup>114</sup> No constitutional limitation on congressional spending is more specific than the obligation to keep it general.

### CONCLUSION

The vision of the spending power set forth above grows from an understanding of the relation between taxes a government demands of its people and expenditures it makes for their well-being. That understanding finds recognition in the Constitution's reciprocal insistence upon uniformity on one hand and commonality and generality on the other. Restoring life to these constitutional commands is a project irreconcilable with some Supreme Court precedent. But the necessary departure from past decisionmaking is no more substantial than that implicit in the Court's recent reconsideration of the commerce power's reach.<sup>115</sup> And the significance of *that* reconsideration is severely stunted absent a corresponding reconsideration of the power to spend. Even if the Court were to eschew an "effects" inquiry completely in its commerce clause analysis, and to insist that the subject of regulation itself fall within a judicial definition of interstate, foreign or Indian commerce, and even if the treaty power were held only to authorize agreements with foreign sovereigns about what we do or forbear from doing to each other, and not agreements about what we do or forbear from doing to ourselves,<sup>116</sup> still the Congress could shape governance on every

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113. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

114. *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). The Court has since shown little enthusiasm for applying this standing rule to taxpayers. It applies only where the measure challenged is a pure exercise of the power conferred by Art. I, § 8, cl.1 (see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)) and the establishment clause is the only "specific constitutional limitation" consistently acknowledged to enjoy taxpayer enforcement under it. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988).

115. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

116. See *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (Holmes, J.): "The subject-matter is only transitorily within the State and has no permanent habitat therein." Subjects of modern treating-making are often much more domesticated. Even if a treaty's implementation requires the consent of both Houses of Congress via legislation (see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the*

subject via conditional spending. Yet the constitutional foundation of such spending is shakier than that of the broad readings of regulatory power for which it so readily substitutes. Only when this is recognized can we honor the Constitution's command that the national government's fiscal relations with its people be "uniform throughout the United States."

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*Original Understanding*, 99 Colum. L. Rev. 1955 (1999)), is Congress authorized to implement *any* domestic regulatory regime which a treaty may mandate, however far beyond congressional regulatory power that regime would otherwise be?